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IN THE

# Supreme Court of the United States

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS, ABIGAIL RICHLIN SCHWARTZ, LOUISE RICHLIN, ELYSSA PARTON and MICHELLE FORKEL,

*Petitioners,*

*v.*

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## ARGUMENT

### I. THE SUPREME COURT SHOULD RESOLVE ALL THE CONFLICTS BY DEFINING JOINT AUTHORSHIP.

#### A. The Issue Of Defining Joint Authorship Is Important And Ripe For Review.

The Supreme Court has squarely addressed the definition of the constitutional term "author" only once, in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S. Ct. 279, 28 L. Ed. 349 (1884). The Court has never defined joint authorship, having remanded the issue without further discussion in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) ("*Community*"), citing only the statutory requirement that the work be prepared by the parties "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* at 754, quoting 17 U.S.C. § 101.

Since *Community*, the circuit and district courts — in *Childress*, *Thomson*, *Erickson*, *Gaiman*, *Aalmuhammed*, *Richlin*, and many other cases — have attempted unsuccessfully to develop standards that might define joint authorship, while limiting the statutory definition to exclude "overreaching contributors."[1] The failure of these efforts is manifest

[1] *See Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Gaiman v.* (Cont'd)

in this case, in which the Academy Award-winning author[2] who originated and first wrote *The Pink Panther* was found not to be the author of the film, story or characters he conceived and created.[3] In *Community*, the Court granted certiorari to resolve conflicting standards for determining the existence of a work for hire relationship, but remanded and did not reach the question of joint authorship. The *Richlin* case presents the proper vehicle for squarely addressing the definition of joint authorship to determine which, if any, of the various differing and conflicting tests created by the circuit and district courts in the twenty years since *Community* is in fact appropriate.

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*McFarlane*, 360 F.3d 644 (7th Cir. 2004); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Richlin v. Metro-Goldwyn-Mayer Pictures Inc.*, 531 F.3d 962 (9th Cir. Cal. 2008).

[2] Maurice Richlin had been nominated twice in 1959, for both *Pillow Talk* and *Operation Petticoat*. He won the Oscar for his screenplay for *Pillow Talk*.

[3] The Ninth Circuit's mechanical three-pronged test, with its emphasis on the "control" factor is clearly wrong. Imagine if, on the same facts, the producer had decided to publish Richlin's assigned treatment as a short comic book with some illustrations added. *Cf. Gaiman, supra.* The analysis of the Ninth Circuit's first two factors (intent and control) would be unchanged because both of those factors have **nothing to do with the content of the final published work**. Richlin would again lose 2-1 and would not be the "author" of his own story – an absurd result. Clearly the third factor, the author's contribution to the final product, should in this case be the most important factor in the analysis. The Ninth Circuit's test, and the result in this case, is simply wrong.

The facts of this case are undisputed, uncomplicated and frequently recurring. Richlin assigned his unpublished literary work to a producer (whom he selected) to adapt his story into a motion picture. This scenario has no doubt occurred countless times before, and will continue to occur in the future. The questions presented: whether Richlin is a joint author of the motion picture he originated, and whether Richlin's heirs obtained renewal term rights under *Stewart v. Abend*, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990), are questions the answers to which will determine the rights of many, many authors and their heirs to numerous copyrighted works.[4] The decision in

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[4] The decision concerning joint authorship would reach far beyond the entertainment field. For example, joint authorship is often an issue with architectural drawings, software, papers in academic and scientific fields, and even storage contracts. *See, e.g., M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486 (11th Cir. 1990) (homeowner was not joint author of architectural plans); *Nordstrom Consulting, Inc. v. M&S Technologies, Inc.*, 2008 U.S. Dist. Lexis 17259, *13 (N.D. Ill. 2008) (defendant gave "directions and ideas" but was not joint author of visual acuity software); *Seastrunk v. Darwell Integrated Tech., Inc.*, 2008 U.S. Dist Lexis 26498, *23 (N.D. Tex. 2008) (defendant was not joint author of air conditioner software); *Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1997) (electrical engineering professor and graduate student were joint authors of scientific paper); *Pods, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007) (remanding for jury trial on joint authorship of mini-storage agreement). Of course, joint authorship disputes arise perhaps most often in the entertainment field. For cases decided in the past year, *see, e.g., Handyman Show, Inc. v. Emmis Television Broadcasting, L.P.*, 2008 U.S. Dist. Lexis 72561 (E.D.La. 2008) (actor and producer could be co-authors of television show); *Ortiz v. Guitian Bros. Music Inc.*, 2008 U.S. Dist. Lexis 75455 (Cont'd)

this case will therefore be of far-reaching importance to a great number of people, indeed to each and every author, as well as the author's heirs.[5]

### B. The Circuit And District Courts Are "Split" And "Uncertain" Over The "Competing" Definitions Of Joint Authorship.

There is admitted confusion throughout the circuit and district courts on how to assess joint authorship claims. For example, three different district courts in the Sixth Circuit have recently concluded that:

> there is **general uncertainty in the law** as to which test should be used to determine whether an individual's contribution rises to the level of a joint authorship.

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(S.D.N.Y. 2008) (composer of film score claimed to be joint author of film); *Latimer v. Roaring Toyz, Inc.*, 550 F. Supp. 2d 1345, 1356-57 (M.D. Fla. 2008), vacated on other grounds, 2008 U.S. Dist Lexis 27052 (M.D.Fla. 2008) (defendants who offered suggestions were not joint authors of motorcycle parts photographs); *Sebastian Music Group, Inc. v. Ayala-Rodriguez*, 2008 U.S. Dist. Lexis 28517 (D.P.R. 2008) (dispute over joint authorship of sound recordings); *Lopez v. Musinorte Ent. Corp.*, 2007 U.S. App. Lexis 4035 (9th Cir. 2007) (dispute over joint authorship of songs); *Jordan v. Sony BMG Music Entm't, Inc.*, 2008 U.S. Dist. LEXIS 96515 (S.D. Tex. 2008) (dispute over joint authorship of songs).

[5] It almost goes without saying that a Supreme Court decision in this case, defining joint authorship, would be of landmark importance to the field of Copyright Law and would necessarily be featured prominently in every Copyright textbook and treatise.

*See Tacori Enters. v. Rego Mfg.*, 2008 U.S. Dist Lexis 73686 (N.D. Ohio Sept. 25, 2008) (emphasis added), citing *Tang v. Putruss*, 521 F. Supp. 2d 600, 605 (E.D. Mich. 2007); *see also Automated Solutions Corp. v. Paragon Data Systems, Inc.*, 2008 U.S. Dist. Lexis 45914, *25-*26 (E.D. Ohio 2008) (citing "**ongoing debate** as to whether each contribution must be separately copyrightable").

Similarly, in the Fourth Circuit, Judge Gregory (in dissent) has noted that "[b]ecause the statute does not define the term 'authors,' **two competing interpretations** have emerged." *Brown v. Flowers*, 196 Fed. Appx. 178, 186-87 (4th Cir. 2006) (emphasis added); *see also Berman v. Johnson*, 518 F. Supp. 2d 791 (E.D.Va. 2007) (highlighting the "**circuit split** regarding the requirements for joint authorship" and declining to follow Ninth Circuit test).

And while a district court in Illinois recently stated that "[j]oint ownership of a copyright results only if the parties intended to be joint authors at the time the work was created," a district court in New York has recently called the very same argument "incorrect." *Compare Nordstrom Consulting, Inc.*, 2008 U.S. Dist. Lexis 17259, at *12-13 (N.D.Ill. 2008) *with Mikhlyn v. Bove*, 2008 U.S. Dist. Lexis 81617, at *54 (E.D.N.Y. 2008) ("Counterclaimants also incorrectly argue that 'to be a joint work the authors must intend that.'").

As demonstrated in the Petition, the mechanical, three-pronged test for joint authorship invented by the Ninth Circuit in *Aalmuhammed* and re-applied in *Richlin* conflicts substantially with the various different

and often conflicting standards used by the Second[6] and Seventh Circuits[7], and no other circuit or district court in the country has adopted the Ninth Circuit's approach since it was unveiled eight years ago.

The Court should grant review to resolve the multiple conflicts between the circuits, and clear up the reigning confusion in the lower courts on the frequently recurring question of joint authorship.

The Court should not allow the circuit conflicts to continue, because they appear very likely to remain unresolved, and the continuing confusion will generate more uncertainty and cause harm to a great number of authors and their families. Because of the Copyright

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[6] Compare the various Learned Hand opinions affirming joint authorship — *Maurel v. Smith*, 220 F. 195 (D.N.Y. 1915) (L. Hand, J.), *aff'd* 271 F. 211 (2d Cir. 1921); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820, 67 S. Ct. 1310, 91 L. Ed. 1837 (1947) — with the more recent opinions denying joint authorship in *Childress* and *Thomson*. The Learned Hand opinions obviously informed the statutory definition of joint authorship set forth in 17 U.S.C. § 101. However, "in order to address the concern of overreaching contributors, the Second Circuit set forth a more exacting standard than the statutory definition." *Price v. Fox Entm't Group, Inc.*, 473 F. Supp. 2d 446, 454 (S.D.N.Y. 2007).

[7] Note the disagreement within the Seventh Circuit between Judge Posner's opinion affirming joint authorship of a comic strip character (Spawn) in *Gaiman*, 360 F.3d 644, and the earlier opinion denying joint authorship in *Erickson*, 13 F.3d 1061.

Act's fee-shifting statute, 17 U.S.C. § 505,[8] it is very risky for authors and their heirs to assert their rights when those rights are in dispute. Indeed, even in this case MGM has sought over $850,000 in fees (which thankfully have been denied because the district court found the claims "colorable"). No doubt other claimants will be deterred from bringing similar claims as a result of the decision in this case, if it is allowed to stand. Because the Ninth Circuit held that an author who assigned his unpublished work to a producer was not an author of a copyrighted work, not only renewal rights under § 304(a) were denied, but also by extension an author and his heirs have no right to take advantage of the extended copyright term provided in § 302(c) and the termination provisions of § 304(c). Therefore, it is likely that the decision, until it is reversed or overruled, will affect the duration, renewal and termination rights of thousands and thousands of authors and their families, depriving them of the benefits the Copyright Act seeks to provide them.

## II. THE NINTH CIRCUIT'S RULING SO GREATLY CONFLICTS WITH PRIOR SUPREME COURT RULINGS ON RENEWAL RIGHTS THAT IT SHOULD BE REVIEWED NOW.

The Supreme Court has at least three times previously resolved issues concerning copyright renewal terms. First, in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 53 S. Ct. 773, 87 L. Ed. 1055 (1943), Justice Frankfurter's opinion confirmed that an author

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[8] *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

may assign his renewal term interest before the expiration of the original term. Next, in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 80 S. Ct. 792, 4 L. Ed. 2d 804 (1960), Justice Douglas's opinion held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues. Finally, in *Stewart*, Justice O'Connor's opinion held that if an author has assigned a portion of the renewal rights, such as the right to produce a derivative work, but dies before the commencement of the renewal period, the assignee may properly continue to use the original work into the renewal period only if the author's successor transfers the renewal rights to the assignee. As a result, the film *Rear Window* could not be distributed without a new license from the owner of the underlying story during the story's renewal period.

The decision of the Ninth Circuit in the present case is in direct conflict with *Miller* and *Stewart*, essentially limiting the holdings of those cases to underlying works that had been separately published prior to assignment to a publisher or producer. *Stewart* has been cut in half, at least, by the Ninth Circuit. *Stewart*'s holding applies when an author assigns a published story to a producer to make a film, but not, in perhaps the more common case, when an author assigns an unpublished story. The distinction made by the Ninth Circuit makes no sense in the context of the Copyright Act, which since 1909 has expressly omitted any requirement that an author obtain copyright protection prior to assignment of his work to a publisher. *See Abend v. MCA, Inc.*, 863 F.2d

1465, 1470 (9th Cir. 1988); *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 402 (2d Cir. 1970). The Ninth Circuit's truncation of *Stewart* needs to be corrected.

It took thirteen years from when the Supreme Court denied certiorari in *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S. Ct. 2666, 53 L. Ed. 2d 266 (1977) until the Court took up a conflicting decision in *Stewart* and finally overruled *Rohauer*. During that period, no doubt many authors failed to assert their rights, especially in the Second Circuit, fearing that *Rohauer* would control the outcome and they would be liable for attorney's fees upon defeat. It took a brave claimant in the Ninth Circuit to challenge and ultimately correct the ruling. The Court should not allow the incorrect ruling in *Richlin* to percolate before it too is overruled. In the meantime, thousands of authors and their heirs will be deprived of the benefits of the Copyright Act.

The assertion that Petitioners have ever "abandoned" or "waived" their claim based on *Stewart* is, sadly, completely false. If true, the Ninth Circuit would hardly have bothered to spend half its opinion attempting to circumvent the claim. Beginning with the Complaint, and continuing through every brief and hearing in this case, Petitioners have made the very same argument (willfully misunderstood by Respondents and misconstrued by the courts): Maurice Richlin is indisputably the author of *The Pink Panther* and his heirs are entitled, under *Stewart*, to renewal term rights in his work, which is a "**copyrighted work**" included in § 304(a) — indeed, one of the most successful copyrighted works in the history of film.

## CONCLUSION

Therefore, Petitioners respectfully request that this Court grant the Petition for a writ of certiorari.

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